IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 146.

Edward McGillen,
Plaintiff in Error,

vs.

Milton H. Bennett et al.,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES W. GOULD,
For Plaintiff in Error.

S. V. WHITE,
of Counsel.

JUDD & DETWEILER, PRINTERS.

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EDWARD McGILLEN, PLAINTIFF IN ERROR,

vs.

MILTON H. BENNETT ET AL., DEFENDANTS IN ERROR.

Replying to the brief of counsel for defendants in error, the plaintiff in error says:

I

Counsel for defendants in error are mistaken as to the sufficiency of the exceptions for a review (if necessary) of this whole case in this Court. The entire evidence is embodied in the bill of exceptions, folio 162, page 71, of Record.

Upon that evidence, in an opinion which is made a part of the record, after a finding of the facts the court found for the plaintiffs below and ordered judgment in their favor for $115,580.55. (Folios 77 and 78, page 34, of Record.)

Prior to the rendition of that judgment and after the findings which directed it, the plaintiff in error moved the court to set aside the findings and grant a new trial—

1. Because contrary to the evidence.

2. Because contrary to law.

3. Because they were contrary to the law and evidence.

4. Because the court refused to find on the whole case for McGillen.

Upon that motion being overruled, plaintiff in error excepted and supplemented it by a final motion in arrest of judgment, because under the pleadings upon the evidence and the finding of the court the plaintiffs below were not entitled to recover, and duly excepted to the ruling of the court in overruling the motion. (See folio 170, page 74, of Record.)

These motions specifically called the attention of the court to every material ruling of law and finding of fact in the trial of the cause and were a more orderly and convenient method of embodying the rulings of the court than any specific prayers to find, as might have been necessary in a trial by jury.

Section 700 of the Revised Statutes, in using the words "if excepted to at the time," means at the time of the trial, not at any specific second of time during the trial, but while the point involved properly engaged the attention of the court.

Nor has this Court set up sections 700 and 1011 of Revised Statutes as a Chinese wall against justice and in favor of its technical defeat.

In Third National Bank *vs.* National Bank, 102 U. S., page 663, the parties waived a jury, and the Court neither found any facts nor any conclusion of law, but rendered a general finding for the defendant.

The Court say in that case:

"We have had some difficulty, therefore, in disturbing the judgment, as there is no charge to the jury and no instructions asked and refused.

"A bill of exceptions, however, embodies the evidence and shows that the court refused to receive the drafts in evidence, although the accompanying evidence of the receipt

of the money by defendant and its payment by plaintiff was the same as in the other case" (referring to White *vs.* National Bank, immediately preceding).

The Court continues as follows:

"To this ruling there was an exception. We are of the opinion that the drafts, the peculiar endorsement, and the payment of the money by the plaintiff and its receipt and use by the defendant were each and all parts of a transaction admissible as evidence of money paid by plaintiff to the use of the defendant, to be repaid on request, and that the court erred in rejecting any part of it. The judgment will, therefore, be reversed *for that error.*"

In that case there was no motion in arrest of judgment or for a new trial, as there is in this; but because it appeared that the court below had rejected evidence tending materially to show that the court should have found a different judgment if it were admitted and considered, it unanimously reversed the case.

II.

Nor is there any difficulty in the right of plaintiff in error to have the due and proper weight given to the contract itself as evidence in this case, because there was a needless mass of testimony offered which in fact did not either explain or elucidate it.

There the contract stood, as plain and intelligible as need be.

That contract provided (folio 13, page 7, of the Record) for the sale of 12,500 head of cattle.

That number was inserted by the vendors, who alone, in contemplation of law, knew how many head of cattle they owned and became a warranty of that number. Further on (folio 15, page 7) the contract provided the fixed damages which should result from a breach of that warranty, as follows:

"Should said number [of cattle] fall short of 12,500 we are to credit the said Edward McGillen on the amount herein provided to be paid at the rate of twenty-five *dollars* per head for such deficit."

We have taken the liberty of underscoring that word *dollars* to call the attention of the Court that the measure of damages upon this breach of implied warranty was fixed in dollars—*not in* ACRES. McGillen was to pay *cash* for the excess above 12,500 cattle at $25 per head. Bennett & Dunman were to credit McGillen *dollars*—not rods or acres.

And there was never a more simple duty to perform for any court than to say to Bennett & Dunman, "Liquidate your damages for your default in delivery in the manner and at the rate which you determined upon as a part of your contract by crediting McGillen with 7,646 head of cattle at $25 per head, or, say, $191,150. Then receive the land as per your contract, which cannot fail to be worth as much as the void Indian leases which you transferred to McGillen, and repay him $59,150 and interest, which was paid under a mistake of fact resulting from your misrepresentations."

The leading and main intent of both parties was to exchange properties. The idea of paying cash at all was to even up the land to the price allowed for the cattle.

The moneys paid and notes given by plaintiff in error were paid and given under a mistake of fact, both parties assuming what was not true, to wit, that there were more cattle than there turned out to be.

The exchange of properties was effectuated, and all there was to do under the contract was for the defendants in error to return boot enough to adjust the difference. Whether one party or the other charged or received too much for his property was immaterial, as they had fixed the price in the contract and no court had power to change it, and the suit should have been dismissed for breach of contract on the part of plaintiff and judgment rendered for defendant on his counter-claim.

III.

We submit, with the most profound respect for the learning of the eminent counsel for defendants in error, that we are not able to follow to the same logical results the argument in the third paragraph of their brief.

The argument insists on presenting itself (in our view) as a begging of the question and to be succinctly stated, is this.

The judgment is right because it is right, and a different judgment would have been wrong.

As to the last clause of the first paragraph of that brief, page 29 (near the bottom), in which counsel say that the essential finding of the court was—

"That the plaintiff in error was indebted to the defendants in error in the sum of $108,850 for cattle and ranch and ranch outfit sold and delivered to him"—

we submit that it was an essential finding of the court; but it was a conclusion of law, not a finding of fact, and that conclusion of law is the basis of this writ and of alleged error, which error we think we have shown.

IV.

The contention of the fourth defense in said brief, that there was an agreement of sale of the ranch and cattle, but not a corresponding sale of the Chicago land, by the terms of that agreement, we think, cannot possibly be a valid one.

The contract says (folio 15, page 8, of Record):

"One hundred and sixty-eight thousand dollars [of the $400,000] is to be paid by the said Edward McGillen, as follows: He is to convey to us, by deed of general warranty, &c., certain Cook-county lands."

And to this recital McGillen added and signed the following memorandum under seal:

"I accept the above conveyance, and am bound by the terms and conditions thereof.

"Witness my hand and seal.

"(Signed) EDWARD MCGILLEN. [SEAL.]"

Is there a lawyer in the world who would contend that upon this contract Bennett and Dunman could not have compelled the specific performance of this contract by a conveyance of the land if McGillen had tried to evade it?

If there is such a lawyer, then he must also hold that he could not be made to sign notes or pay the money, for he as solemnly agreed to convey the land as he did to give purchase-money notes or to pay any money upon default of such notes being executed.

This argument inevitably proves too much, and must relieve McGillen from anything required to be done after the execution of the contract sued upon.

Again, emphasis is laid upon the words "*remaining* $168,000," on the theory that if there were not a "remaining $168,000" nothing was to be paid.

The most elementary principles of construction of contracts will refute this argument.

It was a part of the contract wherein the defendants in error had represented and in effect warranted that they would count out 12,500 head of cattle to plaintiff in error on July 15, 1885, which would require $400,000 to pay for them, and they parcelled out the amount of payments of cash, notes, and land which would equal $400,000. Having arranged for $232,000 in cash and notes, they used the words remaining $168,000, which remained, not in the sense of a variable residuum, after deducting for shortage in the count of cattle, but was remaining only in the order of enumeration of amounts to become payable.

If the contention of counsel be correct, then, if there had been 100 cattle short, amounting to $2,500, there would have been no remaining $168,000, but a remaining $159,500, and, the condition not having been fulfilled by which the

land was to have been conveyed, that sum would have had to be paid in cash.

The mind is said to instinctively "reject pure error," and it rejects that contention as an error.

V.

We come now to the fifth clause of the argument, which contends that it was necessary on July 15th, 1885, that McGillen should have on that day tendered formally a deed. This was not necessary for several reasons which we enumerate:

1st. Time was not the essence of the contract, and courts do not favor forfeitures or penalties from mere temporary accidents, such as the delays of a mail. Before Bennett and Dunman could have demanded their pay in money they must have given notice of their intention and a reasonable time for a compliance with his contract by McGillen.

2d. The defendants in error did not offer assignments of the leases of the Indian lands to plaintiff in error, and therefore McGillen was not in default.

3d. The parties met on July 15th to find that McGillen had paid $59,150 under a mistake of facts growing out of the false representations of Bennett and Dunman, and that they were overpaid for the cattle and ranch property by that amount.

In an executory contract, with mutual and reciprocal covenants, each to the other, the scriptural doctrine applies "he that is without sin" * * * let him first cast a stone."

Here were these defendants in error, who had masqueraded as the owners of vast herds of cattle, who did not own two cows where they had claimed to own five, and upon